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Utah Supreme Court

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UTAH SUPREME COURT
UTAH DOCUMENT
BRIEF
DOCKET NO. 890375

IN THE SUPREME COURT FOR THE STATE OF UTAH

BRENT C. HILL, AUDREY HILL, RUSSELL W. MANGUM, CAROLE MANGUM, and HILL MANGUM INVESTMENTS, a Utah general partnership,	)	
Plaintiffs/Appellants	)	Docket No. 890375 Priority No. 16
v.	)	
SEATTLE FIRST NATIONAL BANK,	)	
Defendant/Appellee.	)	

BRIEF OF APPELLEE SEATTLE FIRST NATIONAL BANK

Appeal from a Final Order of Dismissal in
the Third District Court, Salt Lake County, State of Utah
The Honorable Michael Murphy, District Judge
District Court No. C-87-7694

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FILED
JUL 2 1990
Clerk, Supreme Court

Case No. 890325

UTAH SUPREME COURT
Checklist for Briefs

✓ Timely filing of briefs
An untimely brief may be rejected under Rule 27(d). If a brief is untimely, a motion under Rule 22 or Rule 23 will be mandatory for permission to file a late brief.

✓ Ten Copies

✓ Length (excluding addendum)

1.	Appellant/Appellee:	50 pages
2.	Reply:	25 pages
3.	Petition for Rehearing:	15 pages
4.	Amicus/Intervenor:	50 pages

✓ Size and Binding

✓ Printing Requirements
1. Ten characters per inch. Proportional spacing is acceptable.
2. Print on both sides of the page.
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1. Color:

Appellant or Petitioner	blue
Appellee or Respondent	red
Reply	gray
Amicus, Intervenor, Guardian	green
Petition for Rehearing	tan
Response to Petition for Rehearing	white

2. Name of counsel and parties represented.
3. Argument priority classification (Rule 29) (required for appellee)

✓ Content Requirements - In Order Stated

✓ List of all parties.

✓ Table of contents with page references.

✓ Table of authorities.

___ Jurisdictional Statement (mandatory for appellant).

✓ Statement of Issues (mandatory for appellant).

___ Constitutional or statutory provisions.

✓ Statement of the Case (mandatory for appellant).

___ Relevant facts with citation to the record.

___ Summary of the argument.

✓ Argument.

✓ Conclusion.

✓ Signature of counsel of record or party if pro se.

___ Proof of Service.

✓ Addendum (mandatory for appellant).

IN THE SUPREME COURT FOR THE STATE OF UTAH

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Defendant/Appellee.	)	

BRIEF OF APPELLEE SEATTLE FIRST NATIONAL BANK

I. STATEMENTS OF ISSUES ON APPEAL

Appellee, Seattle First National Bank ("Seattle-First"), takes issue with Appellants' (hereinafter collectively referred to as "Plaintiffs" or "Appellants") STATEMENT OF ISSUES RAISED ON APPEAL.

Plaintiffs' Statement the of the Issues	Seattle-First's Statement of of the Issues
1. Whether a genuine issue of material fact exists which should have precluded the awarding of summary judgment in favor of the defendant?	1. Should the court's summary judgment in favor of Seattle-First as to the second cause of action of the complaint be sustained where the plaintiffs alleged that Seattle-First breached a contract by failing to present plaintiff's construction loan to First Security Bank pursuant to a take-out loan commitment, where it is undisputed that plaintiffs had no rights under this take-out commitment?
2. Whether the trial court erred in applying the doctrine of collateral estoppel to the plaintiffs' claims against Seattle First National Bank?	2. Should the court's summary judgment in favor of Seattle-First as to the second cause of action of the complaint be sustained on the basis that plaintiffs are collaterally estopped from re-litigating the issue as to whether the written take-out commitment between The Citizens Bank and First Security Bank created any rights in favor of the plaintiffs, where this identical issue was fully and fairly litigated in a federal court lawsuit? The Citizens Bank v. Brent C. Hill, et al., Civil No. 86C-1020J, (D. Ut. May 2, 1988).

3. Should the court's summary judgment in favor of Seattle-First as to the fourth cause of action of the complaint be sustained where plaintiffs alleged that Seattle-First failed to provide financing to individual condominium buyers, where it is uncontroverted that Seattle-First received only one presentation from plaintiffs for individual condominium owner financing which did not meet Seattle-First's lending guidelines?

4. Further, should the court's summary judgment as to the fourth cause of action be sustained because plaintiffs failed to file any affidavits that attest that a breach of an oral agreement to provide individual condominium owner financing occurred within four years of the filing of the complaint and the claim is, therefore, barred by the applicable statute of limitations, Utah Code Annotated 78-12-25?

II. STANDARD OF REVIEW

This is an appeal from a grant of a Motion For Summary Judgment dismissing plaintiffs' complaint. This Court's inquiry is whether there is any genuine issue as to any material fact, or, even according to the facts as contended by the plaintiffs, whether Seattle-First is entitled to judgment as a matter of law.

Arrow Industries v. Zions First National Bank, 767 P.2d 935, 937 (Utah 1988); D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989); accord, Copper State Leasing v. Blacker Appliance & Furniture, 770 P.2d 88, 89 (Utah 1988), reh'g denied. The facts and all inferences drawn therefrom should be viewed in the light most favorable to the plaintiffs as the non-moving party. Ron Case Roofing & Asphalt Paving, Inc., 773 P.2d 1382 (Utah 1989). The plaintiffs must, however, demonstrate by affidavits, depositions or answers to interrogatories that specific facts exist which preclude summary judgment. Rule 56(e) of the Utah Rules of Civil Procedure. No deference is to be given to the trial court's view of the law; it is to be reviewed for correctness. Ron Case Roofing, 773 P.2d at 1385.

All undisputed facts set forth by Seattle-First in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment (R.047-156) are deemed admitted pursuant to Rule 4-501(5) of the Rules of Judicial Administration because plaintiffs failed to file any objection or statement opposing Seattle-First's motion as required by Rule 4-501(5).

III. STATEMENT OF THE CASE

A. Background

This lawsuit arises from a loan made by The Citizens Bank (hereinafter "Citizens") in 1980 to plaintiffs, Brent C. Hill, Audrey Hill, Russell W. Mangum, Carole Mangum and Hill Mangum Investments, a Utah general partnership, in which Brent C. Hill and Russell Mangum are partners. The loan (hereinafter "The Citizens Bank loan) was to finance construction of a condominium project known as Garden Towers in the Avenues area of Salt Lake City, Utah. Seattle First National Bank (hereinafter "Seattle-First") purchased a participation in The Citizens Bank loan. Plaintiffs' action is for damages claimed to be the result of alleged wrongful acts by Seattle-First in connection with The Citizens Bank loan. Specifically, plaintiffs have alleged as their second cause of action that Seattle-First breached a contract by failing to properly tender The Citizen Bank loan to First Security Bank (hereinafter "First Security") for a take-out loan. As their fourth cause of action, plaintiffs have alleged that Seattle-First breached a promise to make loans to individuals wishing to purchase a Garden Towers condominium unit.

The Citizens Bank loan was secured by a trust deed conveying the Garden Towers condominium project, made and delivered

by plaintiffs to Citizens. The loan matured on May 1, 1983 and fell into default. On December 13, 1984, Citizens filed a lawsuit to foreclose in the Third District Court, Salt Lake County. The Citizens Bank v. Hill Mangum Investments, et al., Civil No. C-84-7385 (hereinafter "Citizens Bank lawsuit"). In late 1985, Citizens was taken over by the Utah Department of Financial Institutions. The Federal Deposit Insurance Corporation (hereinafter "FDIC") was named as receiver and The Citizens Bank loan was acquired by the FDIC in its corporate capacity.

The FDIC removed The Citizens Bank lawsuit to the United States District Court for the District of Utah (FDIC v. Hill Mangum Investments, et al., Civil No. 86C-1020J). The Honorable Bruce Jenkins granted partial summary judgment in favor of the FDIC and entered a decree of foreclosure on September 3, 1987. Although Hill Mangum Investments filed a Chapter 11 bankruptcy petition, the FDIC obtained relief from the automatic stay and the condominium project was sold by the U.S. Marshal on February 9, 1988. On March 18, 1988, Judge Jenkins granted summary judgment for the deficiency against Brent C. Hill, Audrey C. Hill, Russell W. Mangum and Carole J. Mangum in the amount of $3,960,874.00. Judgment was thereafter entered against Hill-Mangum Investments on April 13, 1990. No appeal was taken.

The complaint in the present action against Seattle-First is virtually identical to the counterclaim and third-party complaint filed in April of 1985 in The Citizens Bank lawsuit. Although named as third-party defendant, Seattle-First was never served in The Citizens Bank lawsuit. Rather, this separate lawsuit was commenced on November 25, 1987, just days after the FDIC had been granted relief from the automatic stay, apparently as one further effort to stall the foreclosure sale of the condominium property.

B. Course of Proceedings

The present lawsuit was initiated by the filing of a complaint (R.002) on November 25, 1987. On January 25, 1989, Seattle-First filed its Motion for Summary Judgment (R.029,030), its Memorandum of Points and Authorities In Support Of Motion For Summary Judgment (R.047-156) and Affidavit of Alan C. Espey In Support of Motion for Summary Judgment (R.031-045). The plaintiffs did not file any objection or statement opposing Seattle-First's motion.

More than ten (10) days after the filing of its Motion for Summary Judgment, Seattle-First filed a Notice to Submit Matter for Decision (R.157-158), pursuant to Rule 4-501 of the Rules of Judicial Administration. On February 13, 1989, The Honorable

Michael Murphy entered an Order (R.159) granting Seattle-First's Motion for Summary Judgment. The next day, February 14, 1989, plaintiffs filed a Request for Oral Argument and Extension of Time Within Which to File Memorandum (R.161). Thereafter, plaintiffs filed a Motion to Set Aside Summary Judgment of Dismissal (R.168) with accompanying Memorandum of Points and Authorities (R.175-199) and Affidavit (R.169-171). This memorandum addressed the merits of Seattle-First's Motion for Summary Judgment. Thereafter, plaintiffs filed numerous affidavits and Seattle-First filed a Motion for Order Striking Affidavits (R.227-253). A hearing was held on May 1, 1989 to address Plaintiff's Motion to Set Aside Summary Judgment of Dismissal. After hearing argument, Judge Murphy entered a Summary Decision and Order (R.308-311) on May 4, 1989, granting plaintiffs' Motion to Set Aside the Judgment and relieving plaintiffs from the summary judgment.

Because the May 1, 1989, hearing fully addressed the merits of Seattle-First's Motion for Summary Judgment, Judge Murphy found no further argument was necessary and took the Motion for Summary Judgment under advisement.

On June 12, 1989, Judge Murphy entered a Memorandum Decision and Order (R.312-317) again granting Seattle-First's

Motion for Summary Judgment. A Final Order of Dismissal in accordance with the Memorandum Decision was entered on July 25, 1989, dismissing plaintiffs' complaint in its entirety and this appeal followed. In this appeal plaintiffs claim only that summary judgment should not have been granted as to their second and fourth causes of action.

A Notice of Appeal was filed on or about August 23, 1989. Plaintiffs' Docketing Statement was filed with the Supreme Court on October 10, 1987, nearly one month late. Although the Docketing Statement bears a certificate of service, it was never received by Seattle-First's attorneys. Plaintiffs' cost bond, which should have been filed; on August 23, 1989, has never been filed. Plaintiffs' Request for Transcript, which was due on September 4, 1989, was never filed; and finally, plaintiffs' Statement of the Issues, due on September 4, 1989, was never filed.

IV. STATEMENT OF FACTS

A. Seattle-First's, Material, Undisputed Facts Which Are Relevant to the Issues on Appeal

1. In 1980 plaintiffs began the development of a ten-story condominium apartment tower in the Avenues area of Salt Lake City, known as Garden Towers. (Complaint ¶4 (R.003), Answer ¶4 (R.020).)

2. Initially, plaintiff had intended to finance the construction with First Security Bank (hereinafter "First Security"). Before the loan was made, however, First Security found itself unable to make the loan. (Seattle-First's Memorandum of Points and Authorities in Support of Motion for Summary Judgment. P.4, ¶2 (R.050)("Seattle-First's Memorandum"); Deposition of Russell W. Mangum taken August 26, 1987, in conjunction with The Citizens Bank lawsuit, (hereinafter "Mangum depo."), pp. 18-21 (R.139-142).)

3. Plaintiffs then arranged for construction financing from The Citizens Bank (Complaint ¶5 (R.004), Answer ¶5 (R.020)).

4. First Security issued a commitment letter addressed to The Citizens Bank wherein First Security agreed to provide take-out funding upon completion of construction if certain criteria were met. This was the only take-out commitment that was issued. This written commitment created no rights in favor of these plaintiffs who were not parties to the agreement. (Final Judgment in Favor of FDIC Against Brent C. Hill, Audrey C. Hill, Russell W. Mangum and Carole J. Mangum, FDIC v. Hill Mangum Investments, et al., United States District Court, District of Utah, Civil No. 86C - 1020J, ¶4 (R.154); Seattle-First's Memorandum p.4, ¶4 (R.050).)

5. The promissory note made by plaintiffs to The Citizens Bank dated April 15, 1982, by its terms matured on May 1, 1983. Seattle-First was not a party to the promissory note (R.082).

6. The Citizens Bank tendered The Citizens Bank loan to First Security Bank which rejected the tender by The Citizens Bank under the First Security take-out commitment on July 1, 1983. (Seattle-First's Memorandum p.6, ¶15 (R.052); Exhibit 40 to Mangum depo. (R.150); Mangum depo., p.40, lines 3-19 (R.143); See also Exhibits "H" and "I" to the appendix of appellants' brief.)

7. Any agreement between Seattle-First and plaintiffs to provide financing for individual condominium purchasers was oral, not written. (Deposition of Brent Hill taken in conjunction with The Citizens Bank lawsuit, p.49, lines 5-16 (R.096); See also statement of plaintiffs' counsel, Lorin Pace, transcript of hearing, May 1, 1989, p.10, lines 2-5).

8. In August 1983, Seattle-First received one presentation from plaintiffs for individual condominium unit financing -- a proposed swap of an apartment/dormitory in Provo for three condominium units. After reviewing the proposal, Seattle-First determined it did not meet its lending guidelines.

(Seattle-First Memorandum, p.7, ¶16 (R.053); Affidavit of Alan C. Espey Aff. ¶4-6 (R.033-034).)

B. Facts Set Forth in Appellants' Brief Disputed By Seattle-First

Although summary judgment will not be granted when a genuine factual dispute exists, the facts relied on to show a genuine dispute must be supported by the record. Many of the facts included in Appellants' unnumbered statement of facts are either completely irrelevant or immaterial to the issues on appeal or lack proper evidentiary foundation or are simply not supported by the record. Appellants' most glaring inaccuracies are illustrated below:

1. On page five of their principal brief, appellants state, "The second of those participation agreements dated December 14, 1981, was for 100% of the loan amount." It is uncontroverted that Seafirst was a 90% participant in The Citizens Bank loan. (Seattle-First's Memorandum, p.5, ¶11 (R.051).)

2. On page five appellants state "In fact, Sea First acted and directed the plaintiffs as if it were the sole lender." Appellants' reference to the record is to the affidavit of Neil Wilson (R.320) that was untimely filed two weeks after oral argument. Seattle-First filed an objection to this untimely

affidavit (R.339). Regardless, this fact, even if true, is neither relevant nor material to plaintiffs' claims, nor does it controvert the essential facts upon which the court based its grant of summary judgment as to the second and fourth causes of action. Plaintiffs' claim in their second cause of action is that Seattle-First breached a contract by failing to tender The Citizens Bank loan to First Security Bank for a take-out commitment. Plaintiffs' claim to be a third-party beneficiary under an agreement between Citizens and First Security for a take-out loan commitment. In their fourth cause of action, plaintiffs claim that Seattle-First failed to provide financing to individual condominium purchasers as promised. The above-stated fact that Seattle-First somehow directed the plaintiffs in some manner is simply not relevant or material to either of these claims.

3. On page 5, appellants state, "Sea First directed Citizens to step back and remain out of the picture with the plaintiffs. "

This supposed fact emanates from a loose translation from the Second Affidavit of J. R. Boswell (R.300). For the reasons given immediately above, this fact, even if true, is again irrelevant and immaterial to plaintiffs' claims in their second and fourth causes of action.

4. On page 5, appellants state, "Seafirst and not Citizens was directly involved in the construction and day-to-day operations at the Garden Towers condominium project, including the determination of a sales strategy and the real broker for the project."

These facts are unsupported by the record. Plaintiffs cite to their complaint, as well as a faxed affidavit of Brent Hill and an affidavit of J. R. Boswell. Mr. Boswell's affidavit does not state or support this fact. Mr. Hill's faxed affidavit, although lodged, was never filed and is inadmissible and mere allegations in the complaint, particularly those denied in the answer are insufficient to controvert Seattle-First's motion. Rule 56(e) of the Utah Rules of Civil Procedure.

Aside from the technical problems, the stated fact, even if true, is immaterial and irrelevant to the claims set forth in plaintiffs' second and fourth causes of action.

5. On page 6, plaintiffs state, "Citizens Bank and Sea First agreed to provide financing to the individual condominium purchasers." This fact is not supported by the record cited by plaintiffs and demonstrates an intentional effort to distort the record and the facts. Once again, appellants' reference is to an allegation in their complaint. They also cite to the affidavit

of Alan C. Espey, a Seattle First Vice-President who states, " . . . Seattle-First would have been willing to finance qualified purchasers of units in Garden Towers, but Seattle-First was never presented with an opportunity to do so." (R.034, ¶7.) Plaintiffs also cite to the affidavit of J. R. Boswell who attests, " . . . Mr. Espey agreed to provide financing in his department with certain conditions and directed Citizens to take all applications and send them to him for review." (R.196.) Plaintiffs further cite to the faxed affidavit of Brent C. Hill (R.288) that nowhere states that "Seafirst agreed to provide financing to the individual condominium purchasers."

6. On page 6 plaintiffs state, "Numerous applications for financing were submitted to Sea First by J. R. Boswell and Ned R. Fox." Again, plaintiffs have not supported this fact by the record. In fact, Judge Murphy found that plaintiffs had not presented admissible evidence of any particular individual condominium purchaser financing arrangement which was wrongfully rejected by Seattle-First and that affidavit testimony that 18 unspecified offers were submitted to Seattle-First was inadequate. (Memorandum Decision and Order, dated June 12, 1989. P.4 (R.315).

The affidavits of J. R. Boswell and Ned R. Fox do not set forth specific facts showing that there is a genuine issue for trial. Rule 56(e) of the Utah Rules of Civil Procedure.

7. On page 6 plaintiffs state, "Only one of these applications was responded to by Sea First despite their promise to make financing available." Plaintiffs cite to the complaint, answer and affidavit of Alan Espey. This fact is completely unsupported by the record and once again evidences a blatant attempt to distort the facts and the record. Although it is impossible to discern from appellants' brief which paragraphs of the complaint, answer or Espey Affidavit are supposed to support this fact, paragraph 20 on page 5 of the complaint (R.006) states, "No loans to individual condominium purchasers were completed by said banks. . . ." In response, Seattle First answered in paragraph 20 on page 4 of its answer (R.022), "In response to paragraph twenty (20), defendant admits that Citizens Bank or defendant did not make loans to individual condominium purchasers, but denies that they had any obligation to do so."

Alan Espey attests on page 3 of his affidavit (R.033) that on only one occasion was Seattle-First approached in connection with the sale of a Garden Towers condominium. On that single occasion, the plaintiffs requested Seattle-First to consider

financing a swap. The offer was to trade a 24-unit apartment building in Provo, Utah, with an appraised value of $550,000, for three Garden Towers' condominiums with an aggregate price of $726,000, plus a Hill Mangum-owned building with $20,000 equity. Seattle-First rejected this deal.

8. On page 6, plaintiffs state, "The take-out commitment by FSB was rejected, and as a result, plaintiffs lost their interest in the Garden Towers project." The plaintiffs' citations to the record only support the first half of this supposed factual statement. The take-out commitment by First Security Bank was indeed rejected on July 1, 1983 after Citizens Bank submitted The Citizens Bank loan to First Security Bank pursuant to an agreement between them. The second half of plaintiffs' statement that they "lost their interest in the Garden Towers project" is nothing but plaintiffs' unsupported conclusion which is entirely unsupported by the record. Mere unsubstantiated conclusions are inadmissible. Creekview Apartments v. State Farm Ins. Co., 771 P.2d 693 (Utah Ct. App. 1989).

V. ARGUMENT

A. Plaintiffs Are Collaterally Estopped From Re-Litigating Their Second Cause of Action

It is extremely difficult to determine from appellants' brief why they believe summary judgment of dismissal should not be sustained as to the second cause of action. The second cause of action of the complaint concerns an alleged breach of the First Security agreement for a take-out loan commitment. Indeed, it has been difficult from the beginning of this lawsuit to determine how plaintiffs could claim damages from the breach of an agreement between Citizens Bank and First Security Bank to which neither Seattle-First nor any of the plaintiffs were a party. Plaintiffs' argument in its brief is vague; no legal theory is presented other than that summary judgment should not have been granted. No mention is made of facts set forth in admissible affidavits that plaintiffs believe controvert Seattle-First's motion and absolutely no authority is presented for plaintiffs' argument. A lone reference is made to the affidavit of Benjamin H. Christiansen, of First Security Bank. (R.192). Seattle-First filed a motion to strike virtually every paragraph of Mr. Christiansen's affidavit (See Motion for Order Striking Affidavits (R.227, 241). Aside from the fact that Mr. Christiansen's

affidavit represents a theory which is irrelevant, his statements are conclusory. He lacks personal knowledge and his statements are pure hearsay. The issue here is not whether Seattle-First had some involvement in First Security's failure to honor its take-out commitment. Rather, the issue is whether plaintiffs had any rights under an agreement for a take-out commitment to which they were not a party.

Plaintiffs and their counsel have apparently forgotten since the filing of their docketing statement, that their theory as to their second cause of action is that the plaintiffs are third-party beneficiaries of the Citizens/First Security agreement for a take-out commitment. (See Plaintiffs' Reply Memorandum of Points and Authorities, p.4 (R.283); Docketing Statement, p.6, ¶5(a)).

In their docketing statement under the heading, "ISSUES ON APPEAL," plaintiffs state:

> (a) The District Court dismissed the Second Cause of Action, on grounds that the Federal Court made a finding that the Plaintiff was not a party to the contract. Plaintiff alleges that this finding was made under Langley. Absent Langley, Plaintiff could have been a third party beneficiary with established rights.
>
> (b) Whether the Doctrine of Collateral Estoppel applies to a party not a party top nor involved in the ongoing action.

Neither of these issues has been properly set out and argued in plaintiffs' brief. Instead, plaintiffs have made some rather unusual, vague, ambiguous and unsupported arguments.

The clear issues upon which this court must focus are:

1. Did the plaintiffs have any rights under the Citizens/First Security agreement for a take-out loan commitment; and

2. Was this issue previously resolved against these plaintiffs in The Citizens Bank lawsuit in U.S. District Court so that plaintiffs are collaterally estopped from re-litigating this issue again.

Shortly after Citizens agreed to make the Citizens Bank loan, it entered into an agreement with First Security for First Security to buy the Citizens Bank loan after the Garden Towers condominiums had been completed. (See letter dated March 31, 1980 (R.324, 325), included in the appendix hereto.) In fact, Citizens tendered the loan to First Security on July 1, 1983 (R.335) and First Security rejected the tender (R.337). This agreement between Citizens and First Security, by its terms, was clearly intended for the benefit of Citizens. There is nothing in the terms of the agreement which awards any kind of a benefit to the plaintiffs. The plaintiffs have never explained in their pleadings or otherwise how they were supposed to benefit from First Security's purchase of The Citizens Bank loan.

In The Citizens Bank lawsuit in federal court, the defendants (plaintiffs herein) filed a counterclaim against Citizens alleging that Citizens had not properly tendered the loan to First Security. These allegations were again made verbatim against Seattle-First in the present lawsuit. (Compare counterclaim in The Citizens Bank lawsuit, ¶35-39 (R.127) with complaint ¶35-39 (R.009)).

Because The Citizens Bank case was virtually identical to the present action, Seattle-First has relied, in part, on the collateral estoppel effect of the Final Judgment (R.152) entered by Judge Jenkins. Plaintiffs urge that there can be no collateral estoppel because the federal court's holding was made exclusively upon the basis of W. T. Langely v. FDIC, 484 U.S. 86, 98 L.Ed.2d 340 (1987). The Langely decision was merely a reiteration by the United States Supreme Court of long-standing statutory and federal common law defenses available to the FDIC acting in its corporate capacity. It is readily apparent upon reading the Final Judgment at ¶4 (R.152), that Judge Jenkins determined that there were no genuine issues of material fact or of law concerning whether the take-out commitment evidenced any interest in favor of these plaintiffs and that his finding on this issue had nothing whatsoever to do with Langely and its progeny.

Specifically, Judge Jenkins found that it was undisputed that the only written take-out commitment was between The Citizens Bank and First Security Bank. The defendants (plaintiffs herein) were not parties to that commitment and its written terms do not disclose any rights in favor of defendants (plaintiffs herein). (Final Judgment ¶4 (R.154). This is an issue wholly independent of the federal court's application of Langley. This issue has, therefore, been litigated and plaintiffs are collaterally estopped from re-litigating the issue again in this lawsuit.

The Utah Court of Appeals in Copperstate Thrift and Loan v. Brune, 735 P.2d 387 (Ut. Ct. App. 1987) quoting Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), set forth the following test for application of collateral estoppel:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2. Was there final judgment on the merits?

3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4. Was the issue in the first case competently, fully and fairly litigated?

The issue decided by Judge Jenkins in The Citizens Bank lawsuit is identical to that presented here. Did plaintiffs have any rights under the agreement for a take-out commitment. The answer is, "no."

The summary judgment entered by Judge Jenkins was a final judgment on the merits. Stokke v. Southern Pac. Co., 169 F.2d 42 (10th Cir. 1948). No appeal was taken. It was entirely proper for Judge Murphy to grant Seattle-First's motion for summary judgment on the basis of the summary judgment entered in The Citizens Bank lawsuit. See 10A Wright & Miller, Federal Practice and Procedure, § 2735 (1983).

In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L.Ed.2d 552, 99 S.Ct. 645 (1979), the Supreme Court stated the importance of defensive collateral estoppel. The Court, quoting its earlier decision in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 28 L.Ed.2d 788, 91 S.Ct. 1434 (1971) stated:

> In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses -- productive

> or otherwise -- to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiffs' allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185, 72 S.Ct. 219, 222, 96 L.Ed. 200 (1952).

Plaintiffs in the instant litigation are the identical parties which filed and litigated the counterclaims in The Citizens Bank lawsuit.

Plaintiffs have stepped aside from their initial claim that they were somehow third-party beneficiaries and have instead presented a vague, unsupported argument that the issues in the Citizens Bank lawsuit regarding the take-out commitment are not identical to the issues in the present case. Their argument now, although difficult to pinpoint, appears to be that Seattle-First somehow owed plaintiffs a responsibility to present the loan to First Security and that this duty or responsibility arose from the participation agreement between Citizens and Seattle-First. The participation agreement, however, as a matter of law created no relationship between Seattle-First and these plaintiffs. Ten Mile Industrial Park v. Western Plains Service Corporation, 810

F.2d 1518 (10th Cir. 1987). This attempt to boot strap supposed obligations to the plaintiffs under the Citizens/Seattle-First participation agreement with a supposed contractual duty to the plaintiffs under the Citizens/First Security agreement makes absolutely no sense and not surprisingly plaintiffs' argument is unsupported by the law or the record in this case.

Returning to plaintiffs' theory that was presented to the trial court and their only theory that reasonably appears to be based on any type of a legal foundation, plaintiffs cannot be third-party beneficiaries. For a third party to have enforceable rights under a contract, that party must be an intended beneficiary of the contract, and the intention of the parties is to be determined from the terms of the contract as well as the surrounding facts and circumstances. The intent of the contracting parties to confer a separate and distinct benefit must be clear. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1989).

Judge Jenkins determined that plaintiffs had no rights under the take-out commitment. This issue has been litigated; the facts are uncontroverted. Plaintiffs were not third-party beneficiaries. Seattle-First is entitled to rely on the collateral estoppel effect of The Citizens Bank lawsuit. Judge

Murphy's decision was correct. Seattle-First is entitled to judgment as a matter of law as to the second cause of action.

B. Summary Judgment Should Be Sustained as to the Fourth Cause of Action

1. **Plaintiffs' affidavits were inadequate to raise a genuine issue as to any material fact.** Plaintiffs' fourth cause of action concerns allegations that Seattle-First orally agreed to provide financing to individual purchasers of the Garden Towers condominiums at market rates, but later refused to do so when loan applications were presented. Alan C. Espey, a Seattle-First Vice-President attests in his affidavit that on only one occasion was an application ever presented to Seattle-First for condominium owner financing (R.032-033). This involved a swap of an apartment building in Provo, Utah, for three Garden Towers units. Mr. Espey went to Provo, checked out the property and reached a determination that the proposed deal would not meet Seattle-First's lending guidelines. To counter this assertion, plaintiffs filed numerous affidavits claiming that eighteen such individual condominium purchasers had applied to Seattle-First for financing.

Plaintiffs' affidavits absolutely failed to identify a single particular for any one of these supposed loan applicants.

Not a single name was given, nor a date on which the application was supposedly forwarded to Seattle-First. Each affidavit failed to set forth any specific facts which would preclude summary judgment in favor of Seattle-First on this issue. Rule 56(e) of the Utah Rules of Civil Procedure, in pertinent part, states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Having failed to adequately controvert Seattle-First's Motion for Summary Judgment with specific facts showing a genuine issue for trial, Judge Murphy correctly found plaintiffs' affidavits to be inadequate to raise a genuine issue as to a material fact and entered judgment in favor of Seattle-First.

2. **Plaintiffs' claim is barred by the applicable statutes of limitations.** Plaintiffs' claim is based on an oral agreement made by Seattle-First to provide financing for individual condominium purchasers. (See Statement by Plaintiffs' counsel, Lorin Pace, Transcript of hearing, May 1, 1989, p.10, lines 2-5 (R. 356)). The statute of limitations for breach of an oral agreement is four years. Utah Code Annotated § 78-12-25. The

plaintiffs failed to present any admissible evidence of any particular purchase financing arrangement within the four-year period immediately preceding the filing of the complaint. Judge Murphy correctly found plaintiffs' affidavit testimony that eighteen unspecified offers were submitted to Seattle-First "between August 1983 to date of foreclosure" was wholly inadequate. This decision was correct. (See Memorandum Decision and Order, p.4 (R.315).)

Plaintiffs have failed to controvert, by adequate admissible evidence, Mr. Espey's claim that the only offer made for individual purchaser financing was the Provo apartment swap.

The grant of summary judgment should, therefore, be affirmed as to the fourth cause of action.

VI. THIS APPEAL IS FRIVOLOUS

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure, Seattle-First requests damages including double costs and its reasonable attorney fees incurred in responding to what is purely a frivolous appeal.

This appeal is not grounded in fact. In order to prevail, plaintiffs must demonstrate that there is a genuine issue as to a material fact that:

1. Plaintiffs had some right under the Citizens/Seattle-First take-out commitment; or

2. Certain, specific offers for individual condominium owner financing were presented to Seattle-First.

Plaintiffs have not demonstrated that single material fact exists.

Plaintiffs' appeal is not warranted by existing law. Plaintiffs have no grounds, based on the uncontroverted facts to claim any rights under the First Security take-out commitment. Furthermore, plaintiffs' argument concerning the application of collateral estoppel in this case is specious and wholly unsupported by the law.

This appeal was interposed solely to harass Seattle-First and to needlessly increase the cost of litigation.

Therefore, Seattle-First should be awarded double costs and attorneys' fees or such other relief as may be determined by this court.

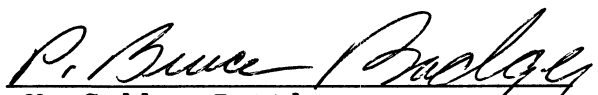
CONCLUSION

Plaintiffs have departed from their theory concerning their second cause of action into a vague, unsupported argument that does not justify reversing the lower court's grant of summary judgment.

Likewise, plaintiffs have failed to adequately controvert Seattle-First's contention that only one offer was ever

presented to it for individual condominium financing. Judge Murphy's grant of Summary Judgment as to the second and fourth causes of action was appropriate and correct. Therefore, Seattle-First prays this court to affirm the trial court's grant of summary judgment of dismissal and to award Seattle-First double costs and attorney's fees associated with defending this appeal.

DATED this 30th day of June 1990.



W. Cullen Battle
P. Bruce Badger
FABIAN & CLENDENIN
A Professional Corporation
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 1990, I caused to be mailed, postage prepaid, four true and correct copies of the foregoing BRIEF OF APPELLEE SEATTLE FIRST NATIONAL BANK, to each of the following:

Frederick N. Green, Esq.
Julie V. Lund, Esq.
GREEN & BERRY
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Attorneys for Appellants

Lorin N. Pace, Esq.
350 South 400 East, #101
Salt Lake City, Utah 84111
Co-Counsel for Appellants

JoAnn D. Smullen

PBB:061990B

A P P E N D I X

FILED DISTRICT COURT
Third Judicial District

JUN 12 1989

SALT LAKE COUNTY
By Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BRENT C. HILL, et al.,	:	MEMORANDUM DECISION AND ORDER
Plaintiffs,	:	
vs.	:	CIVIL NO. C-87-7694
SEATTLE FIRST NATIONAL BANK,	:	
Defendant.	:	

This matter is before the court on defendant Seattle First National Bank's ("Sea-First") Motion for Summary Judgment.

Sea-First in part relies on the judgment in FDIC v. Hill Mangum Investments, Civil No. 86C-1020J (U.S. District Court for the District of Utah, April 29, 1988) ("FDIC action"). Plaintiffs rely on Langley v. FDIC, 98 L.Ed2d 340 (1987) to limit any collateral estoppel effect from the judgment in the FDIC action. As a consequence, this court must determine the applicability on this case of the doctrine of collateral estoppel in light of Langley.

Langley did not involve the doctrine of collateral estoppel. It merely construed Section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 12 U.S.C. Section 1823(e), which purports to insulate the FDIC, as the successor to the assets of a failed

bank, against certain claims and defenses of persons asserting an adverse interest in assets or security of the failed bank.

Plaintiffs contend that because 12 U.S.C. Section 1823(e) is for the especial benefit of the FDIC, Sea-First cannot invoke the doctrine of collateral estoppel premised on an FDIC judgment under 12 U.S.C. Section 1823 (e). There is some merit to plaintiffs' contention, but it goes too far. To the extent the judgment in question is not dependent on 12 U.S.C. Section 1823(e), it may qualify to preclude relitigation of the same issues.

The judgment in the FDIC action contains the following in its findings and conclusions: the defendants concede that alleged interest overcharges did not exceed $250,000.00 and the FDIC waived $250,000.00 in disputed interest in exchange for a judgment on the remaining deficiency. Because the factual issues concerning interest overcharges in the FDIC action were expressly essential to the entry of judgment and are again presented in this action, the resolution thereof in the FDIC action are entitled to collateral estoppel effect in this action. See, Copper State Thrift and Loan v. Bruno, 735 P.2d 387, 390 (Utah App. 1987). These plaintiffs, then, have received the maximum potential benefit from alleged interest overcharges as a result of a $250,000.00 reduction in the deficiency judgment in the FDIC

action. The First Cause of Action in the instant case should therefore be dismissed.

The judgment in the FDIC action further provided that the plaintiffs in the instant case were not parties to the written takeout commitment between Citizens Bank and First Security Bank and thus created no rights in their favor. The court in the FDIC action concluded from this that Langley barred their claims. The consequences flowing from Langley are not entitled to collateral estoppel effect but the plaintiffs in this action are collaterally estopped from challenging the independent, underlying findings and conclusions, i.e., the written commitment created no rights in favor of these plaintiffs. The Second Cause of Action should therefore be dismissed.

The Third Cause of Action alleges tortious interference with business relations premised on alleged interest overcharges, the failure to effectuate the First Security takeout commitment, improper application of loan payments to interest rather than principal, and failure to provide purchaser financing for individual condominium units. The interest overcharge allegations and the failure of the takeout commitment have previously been addressed and neither can be a premise for any claims in this case. The last replacement note matured on May 1, 1983 and the inference is that any misapplication of payments to interest therefore occurred more than four years prior to the

running of the four year statute of limitations, Section 78-12-25, Utah Code Ann. Plaintiffs have failed to counter this inference in any affidavit and have not really addressed the allegation of misapplication of payments to interest. Furthermore, plaintiffs have not presented admissible evidence of any particular purchase financing arrangement which was wrongfully rejected by Sea-First within the four year limitations period. Affidavit testimony that 18 unspecified offers were submitted to Sea-First "between August, 1983 to the date of foreclosure" is inadequate. The Third and Fourth Causes of Action, then, should be dismissed.

The Fifth Cause of Action, alleging fraud, fails to comply with Rule 9(b), Utah Rules of Civil Procedure. Notwithstanding the deficiency, defendant chose to answer the complaint and proceed with discovery. The pending motion before the court is for summary judgment under Rule 56 and the pleadings, depositions and affidavits indicate there is no genuine issue of material fact. Defendant is therefore entitled to judgment as a matter of law on the Fifth Cause of Action. The court, however, is persuaded that plaintiffs are entitled to amend their pleadings in an attempt to state a claim for fraud.

At the hearing on defendant's motion, plaintiffs orally withdrew their Sixth and Seventh Causes of Action.

IT IS THEREFORE ORDERED,

1. Defendant's Motion for Summary Judgment is granted as to the First, Second, Third, Fourth and Fifth Cause of Action.

2. Plaintiffs are given until and including June 26, 1989 in which to file an Amended Complaint setting forth a claim for relief for fraud as an amendment to their Fifth Cause of Action.

3. The Sixth and Seventh Causes of Action are dismissed.

Dated this 12th day of June, 1989.

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision and Order, postage prepaid, to the following, this 12th day of June, 1989:

Lorin C. Pace
Attorney for Plaintiff
350 South 400 East, Suite 101
Salt Lake City, Utah 84111

W. Cullen Battle
P. Bruce Badger
Attorneys for Defendant
215 S. State, 12th Floor
P.O. Box 510210
Salt Lake City, Utah 84151

Marlene Bates

UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH
MAY 2 11 24 AM '88
MARKUS B. ZIMMER
CLERK
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

THE FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized under the laws of the United States, in its corporate capacity, Plaintiff, -vs- HILL MANGUM INVESTMENTS, et al., Defendants.	Civil No. 86C-1020J **FINAL JUDGMENT IN FAVOR OF FDIC AGAINST BRENT C. HILL, AUDREY C. HILL, RUSSELL W. MANGUM AND CAROLE J. MANGUM**
HILL MANGUM INVESTMENTS, et al., Counterclaimants, -vs- THE CITIZENS BANK, Counterdefendant.	
HILL MANGUM INVESTMENTS, et al., Third-Party Plaintiffs, -vs- SEATTLE FIRST NATIONAL BANK, and JOHN DOES 1 through 10, Third-Party Defendants.	

This matter came before the Court on Friday, March 18, 1988, at 2:45 p.m., the Honorable Bruce S. Jenkins presiding. W. Cullen Battle and P. Bruce Badger appeared for the Federal Deposit Insurance Corporation ("FDIC") and Lorin N. Pace appeared for defendants Brent C. Hill, Audrey C. Hill, Russell W. Mangum and Carole J. Mangum ("defendants"). The FDIC renewed its motion for summary judgment in light of W.T. Langley v. Federal Deposit Insurance Corp., 484 U.S. ____, 98 L.Ed. 2d. 340, 108 S.Ct. ____ (1987), and the Court heard arguments on that motion.

Based upon the arguments and statements of counsel, and the affidavits and memoranda in the file, the Court hereby enters the following findings and conclusions:

1. A sale of the real property in question was held on February 9, 1988, pursuant to this Court's Summary Judgment, Decree of Foreclosure and Order of Sale, dated September 3, 1987, resulting in a deficiency after the sale of $4,149,329.41, as of February 10, 1988.

2. Defendants conceded that all of their defenses to the deficiency were barred as a matter of law, except for the following: (1) defenses relating to the alleged misapplication of payments to interest instead of principal; (2) defenses relating to the alleged improper fixing of the applicable rate of interest as based upon Seattle First National Bank's prime rate; and (3)

defenses relating to the Citizens Bank's alleged failure to obtain a takeout of the loan from First Security Bank.

3. Concerning the defenses relating to the misapplication of loan payments, it is undisputed that the payments in question were applied first to interest and then to principal. It is further undisputed that the loan documents of record between defendants and The Citizens Bank provided that payments to be applied first to interest and then to principal. Defendants' defenses therefore rest upon an oral modification of the loan documents or upon an oral side agreement respecting the application of loan payments. Accordingly, the Court concludes that these defenses are barred as a matter of law under Langley.

4. Concerning defendants' defenses relating to the First Security loan takeout commitment, it is undisputed that the only written takeout commitment was between The Citizens Bank and First Security Bank. The defendants were not parties to that commitment and its written terms do not disclose any rights in favor of defendants. Accordingly, to the extent that defendants claim rights under that commitment as against the FDIC, their claims are barred as a matter of law under Langley.

5. As to defendants prime rate defenses, defendants concede that they could have been overcharged no more than $250,000.00 in interest, due to the fact that the promissory

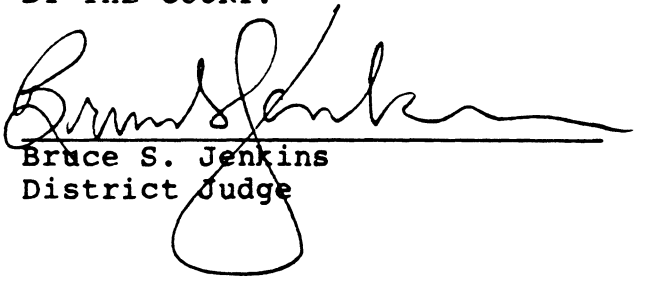
notes contained an interest floor of fifteen percent (15%). The FDIC volunteered to waive the $250,000.00 in disputed interest in return for the entry of judgment as to the remaining amount of the deficiency.

NOW THEREFORE, in consideration of the foregoing and other good cause appearing therefore,

THE COURT HEREBY ENTERS JUDGMENT in favor of the FDIC against defendants Brent C. Hill, Audrey C. Hill, Russell W. Mangum and Carole J. Mangum, in the amount of $3,960,874.40 through March 17, 1988, with post judgment interest thereafter as provided by law. The Court hereby directs the entry of final judgment as to the FDIC's claims against said defendants and expressly determines that there is no just reason for delay for the entry of such judgment.

4/29/88

BY THE COURT:



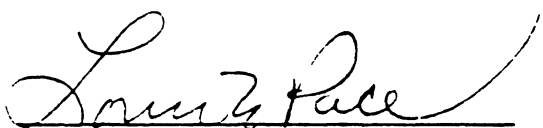
Bruce S. Jenkins
District Judge

Copies mailed to counsel 5/2/88mw

W. Cullen Battle, Esq.
Maxwell Miller Esq.
Joseph Anderson, AUSA
Lorin N. Pace, Esq.
Kent Shearer, Esq.
Herschel Saperstein, Esq.
John L. McCoy, Esq.

Approved as to form:

W. Cullen Battle
FABIAN & CLENDENIN
Attorneys for the
Federal Deposit Insurance
Corporation



Lorin N. Pace
Attorney for Defendants
Brent C. Hill, Audrey C.
Hill, Russell W. Mangum
and Carole J. Mangum

032888A

0033556

First Security Bank of Utah
NATIONAL ASSOCIATION
MEMBER FIRST SECURITY CORPORATION SYSTEM OF BANKS
POST OFFICE BOX 720, 405 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84110

March 31, 1980

Citizens Mortgage Company
285 West No. Temple
Salt Lake City, Utah

Gentlemen:

By this letter, First Security Bank of Utah, N.A. (First Security) agrees on the terms and conditions set forth below to buy from Citizens Mortgage Company (CMC) a construction loan made by CMC to Brent C. Hill and Russell M. Mangum not to exceed an original loan amount of $3,300,000.00

The terms and conditions to be satisfied before First Security shall buy the loan are as follows:

1. The loan must be secured by a valid first lien on a completed 9 story high-rise condominium project containing 39 units. An architect approved by First Security shall certify completion according to plans and specifications previously approved by First Security. At such time as the plans and specifications are submitted to First Security for approval, they shall be accompanied by a detailed Cost Breakdown, a Legal Description of the real property, all legal documents to be used for creation of the condominium, and Appraisal and Market Study prepared by a level 3 FNMA appraiser and such other documents as First Security may reasonably require in order to underwrite the project.

2. The property shall be free from mechanics liens or other encumberances which would interfere with sales of individual units at the time that First Security purchases the loan.

3. No portion of the security shall have been released except that individual condominium units may have been released if the $3,300,000.00 original loan amount is reduced by the larger of the following amounts:

   a. 80% of the sales price of the unit, or
   b. The original loan amount divided by the total number of units in the project, with the result multiplied by 120%.

EXHIBIT "A"

4. The loan amount shall be equivalent to the actual cost of construction of the units, or less, and shall not include land costs or profit to the developer. The land shall be owned by the developer free and clear of liens or encumberances at the time the loan is made. There shall be no subordination of the interest of any other party to the lien.

5. Interest shall be paid current to the day First Security purchases the loan.

6. At the time that First Security buys the loan, the loan shall bear interest at a rate which meets the approval of First Security or the interest rate shall be subject to being modified by First Security without any requirement that the borrower approve the amendment. In any event, however, the interest shall be no higher than — percent over the prime rate charged by First Security at the time First Security buys the loan.

7. CMC shall account to First Security and demonstrate that all funds have been disbursed for construction costs to the best of CMC's knowledge.

8. CMC shall give First Security 30 days written notice of CMC's intent to sell the loan to First Security. The notice shall be addressed to Norval H. Lambert, First Security Bank of Utah, N.A., Mortgage Loan Department, 405 South Main Street, Salt Lake City, Utah 84111. The notice shall not be given less than 35 months from the date the loan is closed nor shall it be given more than 38 months after the loan is closed and in no event shall First Security buy the loan after July 1, 1983.

This commitment shall expire on April 30, 1980 unless prior to that time written evidence is received by First Security that CMC has made the subject loan to Brent C. Hill and Russell M. Mangum.

Dated this 31 day of March, 1980

FIRST SECURITY BANK OF UTAH, N.A.

By: _____
Norval H. Lambert, Vice President

FILED
DISTRICT COURT
BY _____
DEPUTY CLERK

W. Cullen Battle, #A0246
P. Bruce Badger, #A4791
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendant
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

IN THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY, STATE OF UTAH

BRENT C. HILL, AUDREY HILL, RUSSELL W. MANGUM, CAROLE MANGUM HILL MANGUM INVESTMENTS, a Utah general partnership, Plaintiffs,	)	AFFIDAVIT OF ALAN C. ESPEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
v.	)	Civil No. C87-07694
SEATTLE FIRST NATIONAL BANK, Defendant.	)	Judge Michael R. Murphy

---

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

ALAN C. ESPEY, having been duly sworn upon his oath deposes and says:

1. That I am a vice-president of Seattle First National Bank located in Seattle, Washington and have been an officer of the Bank since prior to 1980.

2. I have personal knowledge of Seattle-First's

participation in a $3,800,000 loan made by The Citizens Bank located in Salt Lake City, Utah to Brent C. Hill, Audrey C. Hill, Russell M. Mangum, Carole J. Mangum and Hill-Mangum Investments, a Utah General Partnership. True and correct copies of the certificates of participation as contained in Seattle-First's files are attached as Exhibit A, B and C hereto. The Citizens Bank loan was evidenced by a promissory note dated April 15, 1982 replacing an earlier note dated October 16, 1981 which replaced the original note dated April 22, 1980 and was secured by a Trust Deed dated April 22, 1980, between The Citizens Bank and the borrowers. Seattle-First was not a party to the Citizens Bank notes, Trust Deed or any other documentation with the plaintiffs in this lawsuit relating to the Citizens Bank loan. Seattle-First's sole rights and interest with respect to the Citizens Bank loan are those set forth in the certificates of participation.

3. As an officer of Seattle-First, I have personal knowledge of the prime rate of interest offered by Seattle-First. Attached to this affidavit as Exhibit D is a true and correct summary of Seattle-First's prime rate history during the relevant period. Under the terms of the Citizens Bank loan note, the 15% per annum interest floor became operative when Seattle-First's prime rate was 12.75% or less. As set forth in the prime rate history, this occurred on October 13, 1982 when Seattle-First's prime rate dropped from 13% per annum to 12% per annum.

4. I am aware generally of the allegations made by the plaintiffs in this lawsuit that Seattle-First failed to provide financing to individual purchasers of condominiums known as the Garden Towers in Salt Lake City. I have personal knowledge that on only one occasion was Seattle-First approached in connection with the sale of a Garden Towers condominium. This occurred in August 1983.

5. On that one occasion the plaintiffs in this action requested Seattle-First to consider financing a swap. The offer was to trade a 24 unit apartment in Provo, Utah, known as the Brownstone, with a MAI appraisal value of $950,000 for three large condominiums in the Garden Towers with an aggregate list price of $726,000 plus a Hill Mangum owned building with an indicated $200,000 equity.

The financing requested from Seattle-First did not involve financing the prospective purchaser who owned the Brownstone apartment but a loan by Seattle-First to Hill Mangum for $670,000 to be secured by the Brownstone apartment. The loan proceeds would be applied to the Citizens Bank note balance.

6. I personally traveled to Salt Lake City to first see the Garden Towers condominium and then to Provo to inspect the offered Brownstone apartments. On inspection, the Brownstone was totally designed for college student dormitory housing and unsuitable for apartment use and in poor repair. Based on my investigation of the properties involved and my analysis of the

proposed transaction, I did not approve the requested $670,000 loan by Seattle-First to the plaintiffs in this lawsuit.

7. As manager of the Special Properties unit responsible for Seattle-First's participation in the Citizens Bank loan, I have personal knowledge that from and after the transfer of the Seattle-First's participation in the Citizens Bank loan to Special Properties in August of 1983, Seattle-First would have been willing to finance qualified purchasers of units in Garden Towers, but Seattle-First was never presented with an opportunity to do so.

8. Seattle-First did receive reports from time to time of pending purchase offers received for Garden Tower units. However, each of the purchase offers reported to Seattle-First involved trading property rather than purchaser financing. Further, with the one exception of the Brownstone trade, Seattle-First was never approached or requested to participate or provide financing even with respect to any of these swap transactions.

FURTHER, Affiant sayeth naught.

Alan C. Espey

ALAN C. ESPEY

SUBSCRIBED AND SWORN to before me this 23rd day of January, 1989.

K. Janet Harris

NOTARY PUBLIC in and for the State of Washington, residing at Edmond
My appointment expires 7/19/92